A **YEW YIN LAI**

v.

TEO MENG HAI & ANOR

B HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[DIVORCE PETITION NO: MT1-33-135-2003]
16 MAY 2007

C ***CIVIL PROCEDURE:*** *Interrogatories - Application for leave to deliver - Principles applicable - Application for leave made after close of pleadings - Failure to give explanation for filing application after close of pleadings - Whether absence of explanation for delay is fatal - Rules of High Court 1980, O. 26 rr. 1, 2*

D ***FAMILY LAW:*** *Divorce - Adultery - Burden and standard of proof - Petitioner to prove adultery beyond reasonable doubt - Fact of adultery to be established from oral testimony and not by way of affidavit only*

Vide summons in chambers in encl (22), the petitioner-wife ("the E wife") sought leave under O. 26 r. 1(1) of the Rules of the High Court 1980 ("O. 26 r. 1(1)") to serve on the respondent-husband ("the husband") and another woman, the co-respondent, interrogatories relating to the issues of adultery and paternity, which were called into question in the divorce petition. The wife F served on the husband and the co-respondent the divorce petition on 10 September 2003. The husband filed and served on the wife the answer and counter application on 17 October 2003. The co-respondent filed and served her answer on 20 October 2003. Thereafter the wife did not file any other pleading and only filed G encl (22) on 15 June 2004. The learned counsel for the respondents submitted that encl (22) should be dismissed with costs since the wife had filed encl (22) after the close of pleadings and had failed to give any explanation therefor.

H **Held (dismissing encl (22) with costs):**

(1) Order 26 r. 1 should be read and construed conjunctively with O. 26 r. 2. Order 26 r. 2 which provides that the serving of interrogatories without any leave could only be invoked (by the I wife) before the close of pleadings. (paras 11 & 12)

(2) The pleadings here were deemed to be closed on 31 October 2003 and 4 November 2003 respectively *ie*, 14 days after service of the respective answers. The wife had only filed encl (22) some six months after the pleadings were deemed to be closed. (paras 15 & 16)

(3) Where the pleadings are deemed to be closed, O. 26 r. 1(1) would apply and leave is a *sine qua non*. In order to obtain leave, there must be an explanation for filing the application after the close of pleadings. The wife's affidavit gave no explanation for filing the application after the close of pleadings. Since encl (22) was made under O. 26 r. 1(1) *ie*, after the closing of pleadings, the absence of any explanation for the delay was fatal to encl (22). (paras 17 & 20)

(4) The petitioner bears the burden of proof and the standard of proof for adultery is that of beyond reasonable doubt. *A fortiori,* it should not be proved by way of affidavit only. It is to be established in the form of oral testimony, the veracity of which is to be tested by way of cross-examination and re-examination at the trial itself. (para 22)

Case(s) referred to:
Bastable v. Bastable [1968] 1 WLR 1684 ***(refd)***
Kang Ka Heng v. Ng Mooi Tee [2001] 2 CLJ 578 HC ***(refd)***
Karen Cheong Yuen Yee v. Phua Cheng Chuen [2004] 7 CLJ 102 HC ***(refd)***
Koh Teng Lam v. Koh Chen Chee Elsie & Anor [1975] 1 LNS 74 ***(refd)***
Sarawak Building Supplies Sdn Bhd v. The Director of Forests, Forest Department Headquarters, Kuching & Ors [1999] 8 CLJ 527 HC ***(refd)***
Shum Kai Cheong v. See Too Woon Yee [1998] 4 CLJ Supp 251 HC ***(refd)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, rr. 3(1), (2), 25
Rules of the High Court 1980, O. 18 r. 20(1)(b), O. 26 rr. 1(1), 2

Other source(s) referred to:
MLJ Malaysian Court Forms in Civil Procedure, 2002, para 14002

For the 1st respondent - WK Chew; M/s HS Chew & Co
For the 2nd respondent - Moi Teik Seng; M/s Moi Teik Seng & Partners
For the petitioner - Mogan Karupiah; M/s Mogan Karupiah

Reported by Amutha Suppayah

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JUDGMENT

Low Hop Bing J:

Application

B **[1]** *Vide* summons in chambers in encl. (22), the petitioner-wife ("the wife") is seeking leave under O. 26 r. 1(1) of the Rules of the High Court 1980 ("O. 26 r. 1(1)") to serve on the respondent-husband ("the husband") and another woman, the co-respondent, interrogatories in the First Schedule and the Second C Schedule thereto respectively:

(1) relating to the issues, primarily of adultery and consequentially of paternity, which were called into question in the divorce petition presented by the wife; and

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(2) requiring the husband and the co-respondent to answer the interrogatories on affidavit within 14 days of the order.

Chronology Of Pleadings

E **[2]** As encl. (22) was made pursuant to O. 26 r. 1(1), it is essential for me to place in proper perspective the chronology of pleadings prior to its filing, as follows:

Date	Event
F 10 September 2003	The wife presented and served on the husband and the co-respondent the divorce petition
17 October 2003	The husband filed and served on the wife the answers and counter application
G 20 October 2003	The co-respondent filed and served her answers
20 October 2003 to 14 June 2004	The wife did not file any other pleading
H 15 June 2004	The wife filed encl (22) for leave to serve interrogatories

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Procedure For Interrogatories

[3] The husband's learned counsel Mr. W.K. Chew submitted that the wife who filed encl (22) after the close of pleadings has failed to give any explanation therefor. He prayed that encl (22) be dismissed with costs. Support was sought in:

(1) Rule 3(1) of the Divorce and Matrimonial Proceedings Rules 1980 ("r. 3(1)");

(2) O. 18 r. 20 and O. 26 r. 1(1) of the Rules of the High Court 1980;

(3) *Shum Kai Cheong v. See Too Woon Yee* [1998] 4 CLJ Supp 251 HC; and

(4) *Sarawak Building Supplies Sdn Bhd v. The Director of Forests, Forest Department Headquarters, Kuching & Ors* [1999] 8 CLJ 527 HC.

[4] Co-respondent's learned counsel Mr. Moi Teik Seng also asked for encl (22) to be dismissed with costs as discretion should not be exercised in favour of the wife.

[5] The wife's learned counsel Mr. Mogan Karupiah argued that the above procedural issue raised for both the husband and the co-respondent was misconceived, and devoid of merits, as the wife is entitled to invoke O. 26. He added that O. 26 does not provide that the application for leave to serve interrogatories must be made before the close of pleadings.

[6] Having regard to the above diverse submissions, it is necessary for me to examine the proper procedural steps which ought to be taken by the wife in relation to encl (22).

[7] The procedure regulating the filing of encl (22) is to be found in the Divorce and Matrimonial Proceedings Rules 1980. Rule 3(1) where relevant reads:

> Subject to these Rules and to any other written law, ... the Rules of the High Court 1980 shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending ... in the High Court ...

[8] In my view, r. 3(1) authorises the application of eg, the Rules of the High Court 1980 with necessary modifications. For this purpose, in a case or proceedings pending in the High Court, any provision of the Divorce and Matrimonial Proceedings Rules 1980 authorising or requiring anything to be done in matrimonial proceedings shall be treated as if it were a provision of the Rules of the High Court 1980: r. 3(2).

[9] In dealing with encl (22), it is abundantly clear that the practice and procedure shall be regulated by both the Rules of the High Court 1980 and the Divorce and Matrimonial Proceedings Rules 1980. In this regard, these two sets of Rules are collectively considered as part and parcel of the Rules of the High Court 1980.

[10] That brings me to the construction of r. 25 of the Divorce and Matrimonial Proceedings Rules 1980 which specifically provides as follows:

> RHC O. 26 rule 1 shall apply to a defended cause begun by petition as it applies to a cause within the meaning of that Order.

[11] Order 26 r. 1 should be read and construed conjunctively with O. 26 r. 2, under which a party to any cause or matter may at any time before the close of pleadings without leave of the court deliver interrogatories relating to any matter in question between the parties.

[12] Order 26 r. 2 which provides for the serving of interrogatories without any leave could only be invoked by the wife before the close of pleadings: see *MLJ Malaysian Court Forms in Civil Procedure,* 2002 para 14002, cited for the wife; *Shum Kai Cheong, supra,* at p. 255g HC and *Sarawak Building Supplies Sdn Bhd, supra.*

[13] The meaning of the expression "the close of pleadings" is to be found in O. 18 r. 20(1). It is expressly provided therein that the pleadings in an action are deemed to be closed:

(a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to counterclaim, after the service of the defence to counterclaim; or

(b) if neither a reply nor a defence to counterclaim is served, at the expiration of 14 days after service of the defence.

[14] In the above chronology of pleadings, the wife has not filed a reply or a defence to the husband's counterclaim (the cross-application herein). That being the case, O. 26 r. 1 and O. 18 r. 20(1)(b) would apply, and the pleadings are deemed to be closed 14 days after service of the defence (the answers herein). A B

[15] As the husband's defence (the answers herein) and the co-respondent's defence (the answers herein) were served on 17 October and 20 October 2003 respectively, the pleadings were deemed to be closed 14 days thereafter *viz* 31 October 2003 and 4 November 2003 respectively. C

[16] However, the wife had only filed encl (22) on 15 June 2004, which is beyond the 14 days time frame and is indeed some six months after the pleadings were deemed to be closed.

[17] Where the pleadings are deemed to be closed as in the instant case, O. 26 r. 1(1) would apply and leave is a *sine qua non*. In order to obtain leave, there must be an explanation for filing the application after the close of pleadings. D

[18] Order 26 r. 1(1) was considered in *Shum Kai Cheong, supra*, where after the close of pleadings the applicant sought leave to serve interrogatories upon the respondent. The applicant did not give any reason for the delay in the application which was consequently dismissed by the learned registrar. On appeal, it was submitted for the applicant that the time of the filing of the application was not a material factor when considering whether to grant or refuse leave. The respondent stressed that the issue was not the late filing but the fact that it was done after the close of the pleadings without any explanation. Abdul Kadir Sulaiman J (later FCJ) dismissed the appeal and enunciated the following principles: E F G

(1) Where an application for leave to serve interrogatories is made after the close of pleadings, the applicant must satisfactorily explain to the court as to why it was not done within O. 26 r. 2 and so a satisfactory explanation for delay is a prerequisite; H

(2) Where an applicant gave no reason at all for the delay except to explain the need for interrogatories, on the ground of the lack of explanation for the delay alone, the registrar was right in dismissing the application; and I

(3) Merits of the application will only be considered after the explanation for delay has been considered, but if the reason for the delay is not forthcoming, then it is irrelevant to consider merits.

[19] *Sarawak Building Supplies Sdn Bhd, supra,* concerns another application for leave to serve interrogatories. It was also made after the close of pleadings. No explanation was given for the delay in making that application. Mohamed Kamil Awang J followed *Shum Kai Cheong, supra,* and dismissed the application.

[20] Reverting to encl (22) herein, it is significant to note that the wife's affidavit gave no explanation for filing the application after the close of pleadings. Her learned counsel had not submitted why the above two High Court judgments should not be followed by me. With the utmost respect, I agree with the principles set out in the above two High Court judgments. Since encl (22) was made under O. 26 r. 1(1) ie, after the closing of pleadings, the absence of any explanation for the delay is fatal to encl (22).

Divorce Petition

[21] Para 10 of the wife's divorce petition alleged that the husband had committed adultery with the co-respondent and para 11 therein avers that "the petitioner will prove the said adultery of the respondent with the co-respondent, by oral and documentary evidence, at the hearing of the petition herein".

[22] In the light of the allegations contained in paras 10 and 11 of the wife's divorce petition, it is clear that the wife's intention is and has always been to prove adultery at the hearing of the petition. It appears to me that para 11 of the wife's divorce petition has set out the correct approach ie, to prove the said allegations at the hearing, since the petitioner bears the burden of proof and the standard of proof for adultery is that beyond reasonable doubt and not merely on a balance of probabilities: see eg, *Bastable v. Bastable* [1968] 1 WLR 1684, 1687 per Wilmer LJ; *Koh Teng Lam v. Koh Chen Chee Elsie & Anor.* [1975] 1 LNS 74 per Choor Singh J (Singapore High Court); *Kang Ka Heng v. Ng Mooi Tee* [2001] 2 CLJ 578 HC per VT Singham J; *Karen Cheong Yuen Yee v. Phua Cheng Chuen* [2004] 7 CLJ 102 per Faiza Tamby Chik J (as he then was). A *fortiori*, it should not be proved by

way of affidavit only. It is to be established in the form of oral testimony, the veracity of which is to be tested by way of cross-examination and re-examination at the trial itself.

Conclusion

[23] On the foregoing grounds, I hold that the wife's application in encl (22) is fundamentally flawed. I am therefore unable to exercise my discretion in favour of the wife under O. 26 r. 1(1). In the circumstances, I dismiss encl (22) with costs.